89-346

No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ALASKA AIRLINES, INC. and USAIR, INC.,
Petitioners,

v.

DEPARTMENT OF REVENUE, STATE OF OREGON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE OREGON SUPREME COURT

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

65 pp

QUESTION PRESENTED

May a State constitutionally tax airplanes based on their flight over that State?

PARTIES TO THE PROCEEDINGS

Petitioners Alaska Airlines, Inc. and USAir, Inc. were plaintiffs-appellants in the court below. Respondent Department of Revenue, State of Oregon, was defendant-appellee in the court below. As required by Rule 28.1, petitioners state that Alaska Air Group, Inc. is the parent company of petitioner Alaska Airlines, Inc. USAir Group, Inc. is the parent company of USAir, Inc.

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Petitioners Alaska Airlines, Inc. ("Alaska Air") and USAir, Inc. ("USAir") petition this Court for a writ of certiorari to review the judgment of the Oregon Supreme Court in this case.

OPINIONS BELOW

The opinion of the Oregon Supreme Court is reported at 769 P.2d 193 and is reprinted in the Appendix to this Petition ("App.") at 1a. The opinion of the Oregon Tax Court is reported at 10 O.T.R. 518 and is reprinted at App. 17a. The decisions of the Oregon Department of Revenue are unreported and are reprinted at App. 26a, 30a.

JURISDICTION

The judgment of the Oregon Supreme Court was entered on May 1, 1989. App. 32a. On July 25, 1989, Justice O'Connor entered an order extending the time

for filing a petition for a writ of certiorari to and including August 29, 1989. App. 33a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3, provides in pertinent part that "The Congress shall have Power . . . to regulate Commerce . . . among the several States . . . ."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in pertinent part that "No State shall . . . deprive any person of . . . property . . . without due process of law . . . ."

STATEMENT OF THE CASE

This case presents the question whether a State may constitutionally tax interstate commercial aircraft simply because they have flown over that State. The Oregon tax authorities determined that a State may do so, and they have been upheld by the Oregon Tax Court and the Oregon Supreme Court.

Under Oregon law, the Oregon Department of Revenue ("DOR") is required to make an "annual assessment" of property that has "a situs" in the State and is held for use by certain "designated utilities and companies." Oregon Revised Statutes ("O.R.S.") § 308.515(1)(a). The assessment requirement is applicable to companies engaged in "air transportation," whether "in domestic or interstate commerce or both." *Id.*

When a company operates "both within and without" Oregon, DOR is authorized to value the company's total property "as a unit" and thereafter to determine what part of that "unit" is properly attributable to the State. O.R.S. §§ 308.550, .555. In determining the portion attributable to Oregon, DOR is authorized to employ any

method that is "reasonable." O.R.S. § 308.550(2). The Oregon Supreme Court has interpreted the term "reasonable" as constituting "a codification of the limits imposed by the due process and commerce clauses of the United States Constitution." [1]

A. DOR's Formula for Taxing Airplanes

Based on the foregoing, DOR devised the following time-based formula to assign an in-State taxable value to a given carrier's airplanes flying interstate routes:

$$\text{Oregon Taxable Value} = \text{Total Aircraft Value} \times \frac{\begin{array}{c}\text{Total Oregon Time for Carrier} \\ \text{(Oregon Ground Time plus} \\ \text{Oregon Flight Time plus} \\ \text{Oregon Overflight Time)}\end{array}}{\text{System-Wide Time for Carrier}}$$

Thus, the formula first totals the ground time for each of a carrier's take-offs or landings in Oregon (Oregon ground time); the formula then adds the flight time in Oregon for all of the carrier's flights originating or terminating in the State (Oregon flight time); next, it allocates to Oregon all time spent by the carrier's flights passing *over* Oregon on their way to and from other States (Oregon overflight time); finally, it divides this total time allocated to Oregon by the carrier's system-wide time. The resulting fraction determines the portion of the total value of the carrier's aircraft that Oregon taxes.

B. DOR's Taxation of Petitioners

DOR applied this valuation method to the present petitioners, Alaska Air and USAir.[2] Both companies were

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[1] *Southern Pacific Transportation Co.* v. *Dept. of Revenue*, 732 P.2d 18, 21 (1987).

[2] At the time DOR first applied its formula to USAir's aircraft, they were owned by Pacific Southwest Airlines, Inc. ("PSA"). However, due to the merger between PSA and USAir in 1988,

incorporated outside Oregon; both maintained their corporate headquarters, flight-training facilities, major repair facilities, and base-maintenance facilities outside the State; and only 1% of each company's work force is employed in Oregon. App. 4a.

In 1985, the year here at issue,[3] both companies operated commercial airline flights that landed in Oregon; in addition, owing largely to Oregon's location between major West-coast cities, both carriers had a significant number of flights that merely flew over Oregon enroute to other States. Indeed, both companies had significantly more flights passing *over* Oregon than flights *landing* in the State. Specifically, Alaska Air's 1985 ratio of overflights to in-State flights was 1.57; USAir's ratio was even larger, 2.66.[4] As a result, under DOR's formula, 45% of Alaska Air's assessed aircraft value attributed to Oregon and fully 49% of USAir's value attributed to Oregon was based solely on such overflights. App. 4a. Stated in dollar terms, by including overflight in its taxation formula, DOR nearly *doubled* Alaska Air's assessed Oregon value—from \$11.7 million to \$21.3 million; it similarly increased USAir's assessed value—from \$13.2 million to \$26.1 million.[5]

USAir was substituted as the real party in interest in the Oregon Supreme Court (App. 4a n.1) and is the petitioner here.

[3] DOR's tax assessment date is January 1 and is based on data for the previous year. Thus, the valuation date in this case is January 1, 1986 and rests on 1985 data.

[4] In 1985, Alaska Air had 6,858 Oregon flights and 10,747 overflights, producing its ratio of 1.57. In 1985, USAir had 3,852 Oregon flights and 10,236 overflights, producing a ratio of 2.66. Each carrier's number of overflights and in-State flights is derived from data the carriers file with the U. S. Department of Transportation on ER 586, Domestic Service Segment Data.

[5] The difference in assessed value is calculated simply by removing overflights from Oregon's assessed value.

C. The Tax Court's Decision

Alaska Air and USAir challenged DOR's assessment in the Oregon Tax Court, contending that the effective taxation of their fly-overs violated both the Due Process and Commerce Clauses of the U.S. Constitution. The Tax Court agreed that petitioners' planes had been taxed on the basis of their overflights, holding that that was "precisely the effect of including [the overflights] in the formula." App. 24a n.4. It furthermore agreed that Oregon could not constitutionally tax the overflights unless they had a nexus with or "situs" in the State. App. 19a. The court found this nexus requirement met on two alternative grounds: (1) Oregon's criminal law "extends into the skies" to the overflying planes and any such planes that might fall from the skies would receive the State's "search and rescue" benefits; and (2) in any event, the State's benefits to petitioners' planes that *land* in Oregon "are sufficiently great to extend to *all* of [their] property," including their planes that merely fly over. App. 24a-25a (emphasis supplied). The court therefore affirmed the tax.

D. The Oregon Supreme Court's Decision

Petitioners appealed the Tax Court's decision to the Oregon Supreme Court, again contending that the substantial tax on their overflights violated the Due Process and Commerce Clauses. The State's Supreme Court recognized that Oregon provided no regular services to petitioners' overflights. App. 4a. Indeed, it expressly acknowledged that the only governmental service provided the overflights was exclusively *federal*: "radio communication with radar tracking by air traffic controllers of the Federal Aviation Administration." App. 5a. Nevertheless, as did the Tax Court, the Oregon Supreme Court rejected petitioners' contention that the substantial tax on their overflights violated the Constitution.

Unlike the Tax Court, the Oregon Supreme Court first reasoned that petitioners' overflights had *not* in fact been

taxed: "[t]he validity of each airline's tax assessment does not depend upon whether the State could have assessed a tax against overflights—*the state did not do so.* Rather, the validity depends upon whether each airline's aircraft property was part of a *unit* with situs in this state and whether the state fairly apportioned that unit." App. 8a (emphasis supplied). Because petitioners' aircraft *as a unit* did have significant State contacts—"through aircraft landings, departures, boarding and deplaning of passengers and unloading of cargo"—the court held those contacts sufficient "to sustain the power of this state to levy an *apportioned* ad valorem tax." App. 8a (emphasis supplied). The court therefore saw the central question as whether petitioners' property had been fairly apportioned to the State.

In resolving this apportionment question, the court recognized that the State could not tax extraterritorial values, but only those fairly attributable to activities "in" Oregon. App. 9a. The court furthermore acknowledged that overflights are not "in" Oregon the way that railroad tracks, for example, are "in" the State, and that valuing aircraft on the basis of their overflight is therefore not equivalent to valuing rolling stock on the basis of in-State railroad tracks. As the court stated, "[r]olling stock and railroad track touch the ground, but aircraft in flight, obviously, do not." App. 9a. Nevertheless, the court concluded that petitioners' overflights were "in" Oregon for purposes of the property tax in the same way their flights landing in Oregon were in the State; this must be so, the court reasoned, because petitioners "[did] not explain where an overflight was if not 'in' the state . . . . 'In' would seem to be the answer because [of] . . . the applicability of Oregon criminal law to overflights." App. 10a.

Having thus concluded that petitioners' aircraft as a unit had a "situs" in the State, and that the overflight component of this unit was "in" the State, the court

found DOR's formula consistent with the Due Process Clause. App. 10a. For substantially the same reasons, it also found the formula consistent with the Commerce Clause. App. 12a-14a. The court therefore affirmed the tax against petitioners.

REASONS FOR GRANTING THE WRIT

This Court should grant review in this case for three reasons: (1) the lower court's approval of the challenged tax directly contradicts decisions of this Court; (2) the State courts are currently divided over the constitutionality of such taxes; and (3) such taxes, if permitted to stand, would have a significant, disruptive impact on the airline industry, the nation's transportation system, and the consumers served by that system.

I. THE LOWER COURT'S DECISION DIRECTLY CONTRADICTS DECISIONS OF THIS COURT

The Oregon Supreme Court thought that the question of taxing airplane overflight "ha[d] not before been raised" in this Court. App. 9a. In fact, it has often been raised here; more importantly, it has been repeatedly decided by this Court *directly contrary* to the reasoning and judgment of the lower courts in this case. Indeed, just last Term in *Goldberg* v. *Sweet*, 109 S. Ct. 582 (1989), this Court expressly noted that a "State has no nexus to tax an airplane based solely on its flight over the State." [6] *Goldberg's* recognition of this principle simply reflects a long line of cases that began with *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292 (1944).

In *Northwest Airlines*, this Court for the first time addressed the constitutionality of a State tax levied on planes of an interstate airline. There, the Court held that only an airline's domiciliary State may lay a property

[6] *Id.* at 589 (citing *United Airlines, Inc.* v. *Mahin*, 410 U.S. 623, 631 (1973); *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 302-04 (1944) (Jackson, J., concurring)).

tax on the airline's planes flying interstate, unless another State has "shown . . . that a defined part of the [planes] has acquired a permanent location, *i.e.*, a taxing situs" in that other State. *Id.* at 295, 298. In his concurring opinion, Justice Jackson expressly stated what has become the law of this Court: "*flight over a state* either casually or on regular routes *confers no jurisdiction to tax.*" *Id.* at 304 (emphasis supplied).

Subsequently, in *Braniff Airways, Inc.* v. *Nebraska State Board of Equalization and Assessment*, 347 U.S. 590 (1954), the Court addressed the showing that a nondomiciliary State must make to demonstate that a "defined part" of a carrier's fleet has in fact acquired a taxable "situs" in that other State. The standard to be applied, the Court held, is whether the nondomiciliary State's tax "in practical operation" is shown to have a nexus with specific "opportunities, benefits, or protection conferred or afforded by [that] State." *Id.* at 600 (quoting *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174 (1949)). Because Braniff's aircraft were shown by Nebraska to have eighteen stops a day in that State, the Court held that "the situs issue devolves into the question whether eighteen stops per day by [Braniff's] aircraft is sufficient contact . . . to sustain . . . an apportioned ad valorem tax *on such aircraft.*" 347 U.S. at 600-01 (emphasis supplied). The Court held that "such regular contact is sufficient to establish Nebraska's power to tax," noting that "Nebraska certainly affords protection during such stops and these regular landings are clearly a benefit to [Braniff]." *Id.* at 601.

Since the *Braniff* decision, the Court has twice addressed the question whether activity *less* than the regular landings and departures shown there would meet a State's burden to show "situs" over activities of interstate aircraft. The first case was *United Air Lines, Inc.* v. *Mahin*, 410 U.S. 623 (1973). There, the question was whether a State may levy a use tax on the *full value* of aviation fuel stored in that State and then loaded aboard aircraft

to be consumed in interstate flights. The Court upheld such a tax on the basis of two critical factors: (1) States over which the planes fly would have *no* authority to levy a tax;[7] and (2) permitting a tax on the full value by the State where the fuel was stored and loaded is "a fair result," because that State "is likely to provide substantial services . . . ." 410 U.S. at 630, 631.

The latest reiteration by this Court that overflight does not provide a basis for State taxation came in *Goldberg*, a case that concerned taxation of interstate telecommunications. There, the Court held that only the originating and terminating States "have a nexus substantial enough" to tax an interstate telephone call. 109 S. Ct. at 590. To support its further holding that the States over which the call's electronic signal "merely pass[ed]" would have no basis to tax, the Court, as previously noted, relied on two of its overflight-tax decisions as follows:

> *See United Air Lines, Inc.* v. *Mahin*, 410 U.S. 623, 631 (1973) (*State has no nexus to tax an airplane based solely on its flight over the State*); *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 302-304 (1944) (Jackson, J., concurring). [109 S. Ct. at 589 (emphasis supplied).]

As earlier indicated, the citation to Justice Jackson's opinion includes his determination that "flight over a state . . . confers no jurisdiction to tax."

In the face of these decisions—*Helson*, *Northwest Airlines*, *Braniff*, *United Airlines*, and *Goldberg*—it is difficult to understand how the lower courts could have found the question presented by this case to be an open one. Under this Court's decisions, planes flying over a State

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[7] In holding that fly-over States have no jurisdiction to tax, the Court relied on *Helson & Randolph* v. *Kentucky*, 279 U.S. 245 (1929). There the Court held that a State through which an interstate boat trip passed could not constitutionally tax fuel consumed in the passage.

are not "in the State" either for Due Process or Commerce Clause purposes. The fact that Oregon chose to tax petitioners' airplanes as "a unit" does not alter this constitutional principle. Rather, it simply means that the State had to apportion to Oregon only that part of the unit which was "in the State." Whether this case is viewed as one of nexus under the Due Process Clause, or one of apportionment under the Commerce Clause, the constitutional standard is in either event the same: a State may not tax "property not located in the taxing State." *Norfolk & Western Railway Co.* v. *Missouri State Tax Commission*, 390 U.S. 317, 325 (1968). Such a tax "is constitutionally invalid, both because it imposes an illegitimate restraint on interstate commerce and because it denies to the taxpayer the process that is his due." *Id.* (footnote omitted).

The *only* justification the Oregon courts gave for treating the overflights as "in the State" was their claim that Oregon's criminal laws might be applied to overflights and that search and rescue benefits might be afforded if a flight landed in Oregon on an emergency basis. There are several complete answers to these claims.

First, the claims are completely incompatible with this Court's determination that States have *insufficient* contacts to warrant overflight taxes. Second, even if this Court's decisions were not otherwise completely dispositive, under *Northwest Airlines* and *Braniff* it was DOR's burden to prove that its contacts were of such significance "in practical operation" that they effected a "situs" for the overflights. DOR never did so; indeed, for all the record shows, Oregon's asserted criminal law and search and rescue have never been applied or given any benefit to a *single* carrier overflight, must less served as a constitutional justification for multi-million-dollar assessments on overflying carriers.

It is not surprising that DOR could not make the requisite showing. Whatever criminal laws Oregon might

hypothetically apply to the overflights are rendered superflous (if not wholly pre-empted)[8] by the comprehensive, pervasive federal scheme of criminal laws relating to interstate air commerce that already prohibit: threats of harm regarding interstate flights, thefts from interstate commerce, civil disturbances on interstate aircraft, transportation of stolen goods on interstate commerce, stowaways on aircraft, transportation of firearms or ammunition by aircraft passengers, carrying weapons or explosives aboard aircraft, improperly carrying hazardous materials aboard aircraft, aircraft piracy, interference with flight crew members or flight attendants, assault, maiming, personal property theft, receiving stolen property, murder, manslaughter, attempted murder or manslaughter, sexual abuse, robbery, and conveying false information. 18 U.S.C. §§ 35, 659, 922, 2101-02, 2199, 2314; 49 U.S.C. § 1472.

Similarly lacking in substance is the claim that State assistance to emergency landings creates a taxable nexus for *all* overflights. In the first place, any emergency *landings* are already counted in DOR's formula as in-State Oregon flights, not overflights. App. 24a-25a. Second, DOR did not even begin to show that "in practical operation" its asserted search and rescue efforts have established an in-State "situs" for overflights. Quite to

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[8] As this Court held in *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973), federal regulation of the nation's navigable airspace is "intensive and exclusive" (citing *Northwest Airlines*, 322 U.S. at 303 (Jackson, J., concurring)). Indeed, what Justice Jackson noted in *Northwest Airlines* is still true today:

> [Airplanes] move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. * * * [A plane's] privilege, rights and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government. [322 U.S. at 303 (Jackson, J., concurring).]

the contary, there have been no crashes by overflying air carriers or commuter airlines in Oregon in the last 20 years—as far back as the National Transportation Safety Board has records available. Moreover, even assuming there would be need for a search and rescue operation related to an overflight air carrier crash, that operation would be performed by either civil air patrol or military flying units—which are *federally-supported* entities.

Finally, in those cases where State search and rescue services might be provided to an airline in Oregon, any cost of those services borne by the State is *already* paid for. Under O.R.S. § 493.070, all moneys received by the Aeronautics Division of the Oregon Department of Transportation from pilot registrations are paid into an Aeronautical Search and Rescue Account. "Such amount as may be necessary, and no more, is appropriated out of such account *for the payment of all expenses incurred by the division in conducting activities authorized under ORS 491.190 to search for lost planes and lost persons, the rescue of lost persons, pilot survival education and training and all other expenses directly attributable to the search and rescue program* and the registration of pilot licenses." *Id.* (emphasis supplied). Accordingly, in no event could such putative services by the State justify overflight taxes.

Furthermore, the unconstitutional burden on commerce imposed by such taxes is clear under numerous other decisions of this Court. That burden lies not only in the State's taxing of values which it has no nexus to tax and which are not properly attributable to the State. Under this Court's decisions, it is also clear that Oregon's tax: (1) risks multiple taxation of overflights, (2) operates in a discriminatory manner against those flights, and (3) impermissibly disrupts the free flow of commerce by laying tariffs on the air above a State—simply because that State happens to lie below a significant in-

terstate flight path. Each of these three points will be briefly addressed.

If other States were to adopt a time-based formula for taxing airplanes, under *Goldberg* the *only* States that would have a sufficient nexus to count overflight time for a given flight would be those States where the flight originated or terminated. Under *United Air Lines* this also would be the fair result inasmuch as those States would be the ones that provide the substantial take-off and landing facilities. Yet if an intervening State such as Oregon *also* were to count overflight time for that same flight—merely because the plane happened to pass over the State—the inevitable result would be double taxation of the same interstate flight. This is unquestionably prohibited by this Court's decisions.[9]

This Court's decisions also prohibit a tax which in practical operation either discriminates against interstate commerce in favor of intrastate commerce, or favors some participants in interstate commerce over others. *See, e.g., Goldberg* v. *Sweet*, 109 S. Ct. at 591; *American Trucking Associations* v. *Scheiner*, 483 U.S. 266, 281-87 (1987); *Maryland* v. *Louisiana*, 451 U.S. 725, 756 (1981). Oregon's tax discriminates in both these ways. Since flights within Oregon and those that overfly the State are taxed at the same rate—but only the former receive State services of any significance—Oregon is necessarily imposing a higher effective rate for those services on carriers with substantial overflight than those with little or none.[10] Moreover, the higher the ratio of flights be-

[9] *See, e.g., Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U.S. 232, 240-48 (1987); *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 642-46 (1984).

[10] Nine carriers with landings in Oregon also have taxable overflights (American Airlines, Alaska Airlines, Continental Airlines, Delta Airlines, America West, Northwest Airlines, USAir, United Airlines, and Horizon Airlines). But five other carriers with land-

ginning or ending in Oregon to flights merely overflying the State, the lower will be the effective rate for services rendered. Consequently, the *lowest* effective tax would be imposed on a wholly intrastate carrier, which by definition has the highest level of services provided to it by the State. Such a tax structure—obviously favoring those that "ply their trade within the State"—unconstitutionally discriminates against interstate commerce.[11]

Ironically, a tax such as Oregon's also discriminates against petitioners in favor of carriers who have substantial overflight but have *no* landings in the State. Those carriers are not taxed by Oregon *at all*, even though the Oregon Supreme Court held that their activities were "in" the State and were therefore taxable.[12] Quite arbitrarily—and discriminatorily—such a carrier is not taxed by Oregon unless it lands once, and then that one landing triggers a tax on *both* that single landing and *all* the carrier's overflight.

Finally, and perhaps most significantly, the tax in this case runs afoul of the "central tenet" of the Commerce Clause to which this Court has "steadfastly adhered"—that the Clause "by its own force created an area of trade free from interference by the States." *Scheiner*, 483 U.S. at 280 (quoting *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318, 328 (1977)). If

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ings in Oregon have no taxed overflights at all, *i.e.*, flights that merely pass over the State (Eastern Airlines, Hawaiian Airlines, TWA, United Express, and Skylink Airlines).

[11] *Scheiner*, 483 U.S. at 286. In *Goldberg*, the Court held that this kind of discrimination would not be held unconstitutional if it were directed against in-State residents or concerned activities that could not easily be measured. 109 S. Ct. at 591. Neither circumstance is presented here: both petitioners are non-domiciliaries in Oregon and their overflights have already been precisely measured.

[12] At least one domestic carrier—Pan Am—has Oregon overflight, but no landings, and is not taxed by the State.

there were in fact substantial State services associated with the passage of an interstate flight over a State, a tax could appropriately be assessed. But, as we have shown, that is not the case. Rather, simply to take advantage of its fortuitous position in the middle of the West Coast's north/south flight corridor, Oregon has erected a toll both at 35,000 feet for interstate airplanes wishing to pass over the State.[13]

As a result, if Alaska Air wished to inaugurate a new Seattle/Los Angeles flight, it must either find a circuitous route that avoids Oregon, or pay Oregon a fee for overflight. Worse, if an overflight tax like Oregon's were approved elsewhere, USAir could be subjected to *multiple* overflight tolls from the several States it must cross if it wished to offer, say, a new trans-continental flight from Pittsburgh to San Francisco. Thus, Oregon's ac-

[13] To illustrate how disproportional overflight time is in the State of Oregon—and how much it *inflates* that State's tax—we show below each petitioner's ratio of flyover time to in-State time for the year in question (1985), both for Oregon as well as for each petitioner's operations system-wide:

		A Ground Hours & In-State Hours	B Flyover Hours	C Column B as a % of Column A
Alaska Air	Oregon only	7,830	7,566	97%
	System-wide	276,758	23,674	9%
USAir	Oregon only	6,511	6,312	97%
	System-wide	377,520	6,442	2%

As the chart demonstrates, Alaska Air and USAir have almost as much overflight time for Oregon as they do ground time and in-State flight time for that state. But system-wide this is not true at all: on average, less than 10% of petitioners' 1985 time in *all* States was overflight, owing to other States' much smaller proportion of overflight to in-State flight and ground time. As a result, in a State like Oregon—which happens to lie in the middle of important interstate flight paths—inclusion of overflight in the State's tax base greatly exaggerates its property tax. (As noted, the USAir data for 1985 refer only to PSA operations, now merged with USAir.)

tion, if upheld, would require airlines to begin making flight routing decisions no longer just on the basis of safety, operational efficiency, and air traffic control considerations; instead, they would also have to consider tolls demanded by those States that are in the path of air routes heretofore exclusively determined, maintained, and protected by the federal government. Such disruptive results are prohibited by this Court's decisions, because their "net effect would be substantially to resurrect the customs barriers which the Commerce Clause was designed to eliminate." *Michigan-Wisconsin Pipeline Co.* v. *Calvert*, 347 U.S. 157, 170 (1954).

For all these reasons, the lower Court's decision contradicts this Court's constructions of the Due Process and Commerce Clauses. The Court should grant certiorari to enforce its own decisions and to make clear that a tax such as Oregon's is constitutionally prohibited.

II. THE VARIOUS STATE TRIBUNALS ARE DIVIDED OVER THE CONSTITUTIONALITY OF OVERFLIGHT TAXES

While petitioners believe this Court's decisions should have foreclosed the possibility that *any* State would impose a tax based on overflight, that is not the case. Courts or agencies in no less than five different States have recently had to address the permissibility of such taxes, and they are divided 3-2 on the question. The five States are Oregon, Montana, Wisconsin, Pennsylvania, and Idaho. The division among them provides further reason for this Court to grant certiorari in this case.

Prior to the Oregon decisions in this case, the Montana Supreme Court addressed the same question presented here and resolved it directly contrary to the Oregon Supreme Court. *Northwest Airlines, Inc.* v. *State Tax Appeal Board*, 720 P.2d 676 (1986). There, as here, the State's DOR had included overflight mileage in the numerator of its apportionment formula for purposes

of assessing a tax (there, an income tax) on an interstate airline. Finding that "[t]he flyover flights of Northwest have no contact with Montana"—"not even . . . radio contact"—the court invalidated the tax.[14]

On the other hand, two other States—Wisconsin and Pennsylvania—have followed Oregon's lead in imposing taxes on overflights. Wisconsin's tax is not simply on the privilege of overflight, but is imposed on drinks thought to be sold aboard the aircraft during overflight above Wisconsin. By a 3-2 vote, the Wisconsin Tax Commission upheld this tax, expressly relying on the Oregon Supreme Court's decision in this case. *Republic Airlines, Inc.* v. *Wisconsin Dept. of Revenue*, ¶ 203-058 Wisc. Tax Reports (CCH) at 14,247 (May 3, 1989). The dissenting Commissioners would have invalidated the tax, reasoning, as did the Montana Supreme Court, that activities during overflights are not "in this State." *Id.* at 14,256.

The Commonwealth of Pennsylvania likewise imposes a tax on overflights by apportioning interstate carriers' net income to that State based on miles flown over it. The DOR in the State recently rejected USAir's attack on the constitutionality of such a tax. *USAir, Inc.* v. *Pennsylvania*, No. 567 at 8 (Pa. Commw. Ct., Aug. 30, 1988) (LEXIS, States library).

Finally, the Supreme Court of Idaho recently determined—contrary to the decisions in Oregon, Wisconsin, and Pennsylvania, but consistent with that in Montana—that States may not tax overflights. In the course of holding that nonresident train crews merely passing through the State could not be subjected to tax, the Court relied on the prohibition against a similar tax on overflights:

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[14] The case turned on the Court's determination that flyovers are *not* "in this state" within the meaning of the Montana taxing statute. 720 P.2d at 678. Because the Oregon Supreme Court's determination turned on its directly contrary view—that flyovers *are* "in" the State—the two courts' decisions are plainly in conflict.

> A bank executive from Denver may fly regularly between Denver and Seattle, passing over Idaho on each trip. By the logic of [the DOR,] this executive would be required to pay Idaho income tax while traveling across Idaho. Idaho would apparently have provided this executive with the fruits of its civilization for which it was entitled to payment. No case has been cited that would subject this banker to income taxation by Idaho, *merely because of invasion of our air space. There is no authority for doing so.* [*Blangers* v. *Idaho, Dept. of Taxation*, No. 138 (Idaho Oct. 28, 1988) (LEXIS, States library) (Denying Petition for Rehearing) (emphasis supplied).]

The cases in these five States illustrate several important points. First, notwithstanding this Court's decisions, the State courts are divided over the permissibility of overflight taxes. Second, those taxes are proliferating. And third, as further discussed below, the impact of those taxes in the various States is likely to be quite substantial on the airline industry and those it serves. For these reasons, the Court should grant certiorari to guide the States concerning the permissibility—if any—of such taxes.

III. OVERFLIGHT TAXES WOULD HAVE A SIGNIFICANT IMPACT ON THE AIRLINE INDUSTRY AND THE NATIONAL TRANSPORTATION SYSTEM

A. The State of the Industry

In the 10 years since passage of the Airline Deregulation Act (1978), the airline industry has changed dramatically. As the most recent FAA study demonstrates, from fiscal year 1979 to fiscal 1988, U.S. air carrier activity "has *increased* substantially (up 26.2 percent)," air fares in real dollars "ha[ve] *declined* more than 20.0 percent (2.3 percent annually)" and, primarily due to competitive forces and the introduction of the "hub-and-

spoke" route system, "the traveling public has benefited from *better service* since deregulation . . . ." *FAA Aviation Forecasts—Fiscal Years 1989-2000* (March 1989) ("FAA Report") at 39, 45, 46 (U.S. Dept. of Transportation) (emphasis supplied).

At the same time, the profitability of the industry—and the viability of many individual carriers—has been adversely affected by deregulation. During the 5-year period 1979-1983, owing in part to carriers' "lack of experience in competing in an unregulated market," U.S. carriers posted cumulative operating losses of over $1 billion. FAA Report at 50. Moreover, of the 70 new carriers entering the market since 1979, only 17 survived, and a "number of [the survivors] are in financial trouble." *Id.* at 57.

While the industry's performance began to improve beginning in 1984, "the air industry's rate of return is still below that of other unregulated industries . . . ." *Id.* at 50. Indeed, the most recent figures from the Bureau of Census show that among the 30 largest U.S. industries, air transportation ranks next to last in net profit margin (1.9%). *Statistical Abstract of the United States* at 540 (Department of Commerce, Bureau of Census, Jan. 1989). Furthermore, even these figures are somewhat misleading in that a few larger carriers have "accounted for 85.9 percent of the cumulative operating profits of the entire industry." FAA Report at 50. In contrast, "[m]ost of the [other] carriers, although profitable, have managed to post only meager operating profits over the 10-year period and . . . most have incurred net [overall] losses over the period." *Id.*

B. The Importance of the Industry

Although the economic health of the industry itself is weak but improving,[15] its contribution to the national

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[15] For example, while revenue per passenger mile for domestic service declined on a year-over-year basis for 10 consecutive quar-

economy and to the national transportation system is robust and growing. By 1987, 72% of all American adults had flown, and the average number of flights per year for the flying public was 3.4 roundtrips.[16] In fiscal year 1988, the country's 61 domestic commercial scheduled passenger and cargo carriers flew 414.2 million passengers—almost double the country's population.[17] By the year 2000, the FAA projects the number to be nearly 700 million. FAA Report at 76. Furthermore, airlines now account for 92% of all common carrier inter-city travel (air, rail, and bus).[18]

The industry now employs some 480,000 people directly, another 300,000 are employed at airports, in aerospace, and other related industries, and approximately 60,000 more are employed by the federal and State government to oversee and facilitate airline services—for a total of over 800,000 employees with a payroll of nearly $30 billion annually. *The Economic Benefits of Air Transportation* at 1-2. Moreover, these numbers do not include the hundreds of thousands of persons engaged in the travel and tourism industry—which is the country's second largest private employer (after medical[19])—all

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ters—from the fourth quarter 1984 to the first quarter 1987—it began to increase in fiscal year 1988. In real dollars, revenues per mile increased by 5.0 percent from 1987 to 1988 (from 10.07 cents to 10.57 cents). FAA Report at 61.

[16] *The Economic Benefits of Air Transportation* at 6 (Air Transport Association of America, Sept. 1988).

[17] These passengers flew some 330 billion miles domestically in fiscal 1988. FAA Report at 28. In addition, carriers flew some 8.1 billion freight, express, and mail ton miles domestically. FAA Report at 37.

[18] Air Transport Association of America 1989 Annual Report at 7.

[19] *The 1988-89 Economic Review of Travel in America* at 35 (U.S. Travel Data Center 1989).

of whom depend on airline services.[20] Those airline services, furthermore, provide benefits to the country that cannot be quantified, such as greater job mobility; increased business efficiency and productivity; increased access to friends and family, to health and recreation facilities, and to business opportunities; the speedy distribution of mail, industrial raw materials, and finished consumer goods; the overnight delivery of medical supplies, vital organs, bank checks, and time-sensitive documents; and the enhancement of national security.

C. The Industry and Taxes

States and localities currently impose a number of taxes on air carriers, including fuel taxes, sales taxes on aircraft and parts, licensing and registration taxes, landing fees and facility rentals, and property taxes (both on facilities and aircraft). *State Aviation Activity Funding and Aviation Generated Tax Revenue* (National Association of State Aviation Officials, Center for Aviation Research and Education, Sept. 1988). It is estimated that in 1987 alone, user fee payments made by carriers (such as landing fees, rentals, and related assessments) amounted to more than $2 billion. That same year, the carriers paid another $800 million in federal income taxes. In addition, airline employees paid some $4.4 billion in local, State, and federal taxes, while passengers and shippers paid another $4 billion in taxes that went directly to the federal Airport and Airways Trust Fund to fund federal capital and operating expenditures for airport improvements and expansion and the enhancement and operation of the air traffic control system. *The*

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[20] *The Economic Benefits of Air Transportation* at 1. One recent study estimates that when all U.S. jobs attributable to aviation are considered—those in aviation use, aviation provision, and aircraft manufacturing—they add up to 8 million workers who contribute 5.6% of the nation's gross national product. *The Economic Impact of Civil Aviation on the U.S. Economy* at 6-7 (Partnership for Improved Air Travel, June 1989).

Economic Benefits of Air Transportation at 4. This is thus a heavily taxed industry that already pays significant sums for federal and State contributions to aviation.

The threat that significant further taxes will be added to these taxes is a serious concern to these petitioners, particularly for a smaller carrier such as Alaska Air. Its Oregon overflight tax for 1988 alone—more than three-quarters of a million dollars—represented a 200% increase since the year here at issue, an increase due in large part simply to the fact that the carrier increased its flights from Alaska and Washington to California and Arizona (thus creating greater Oregon overflight). Petitioners must assume—as must the airline industry as a whole—that if this Court permits the present Oregon tax to stand, similar taxes will quickly be adopted in other States and localities.[21] The resulting impact on interstate commerce, on the industry, and on consumers would be considerable. Indeed, for an industry whose profit margins are slim already—and in the case of smaller carriers, for whom they are almost non-existent—such an additional tax could be highly injurious. As noted in the Senate Report accompanying the legislation disapproving airport departure taxes, "If the passenger must pay [the] tax, it adds directly to the cost of [the] trip." And even

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[21] As Oregon's Assistant Attorney General has acknowledged, "other states and quite a few airlines are keeping an eye on (this case)." *The Business Journal—Portland*, Oct. 31, 1988, Section 1 at 2 (quoting Assistant Attorney General Jerry Bronner). The most recent example of how quickly an air transport tax spreads is the departure tax approved by this Court in 1972. *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines*, 405 U.S. 707 (1972). When this Court let that tax stand, there were then (as is true in this case) only five or six jurisdictions with such a tax. During the year after this Court's decision, some 44 jurisdictions had adopted the tax. Airport Development Acceleration Act of 1973: Hearings on H.R. 4082, H.R. 2695, H.R. 4213, H.R. 4214, H.R. 4182 and S.38 Before the House Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 93rd Cong., 1st Sess., at 64-67 (1973).

if carriers attempt to absorb it, "it will still lead to increased air travel costs" inasmuch as "[t]he airlines could not reasonably be expected to bear such a burden." Accordingly, "[i]n the end, a fare increase would have to be implemented," thereby "mak[ing] air travel uneconomical for some people, and . . . inhibit[ing] the growth of the air transportation system . . . ." S. Rep. No. 12, 93rd Cong., 1st Sess., at 1451 (1973).

Given the serious doubt about the constitutionality of overflight taxes, given the conflict in the lower State courts over the permissibility of such taxes, and given the inevitable, injurious proliferation of such taxes should the present one be permitted to stand, the Court should grant certiorari.

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF OREGON

(OTC 2496/2497; SC S34859 (Control)/SC S34860)

ALASKA AIRLINES, INC.,
Appellant,

v.

DEPARTMENT OF REVENUE,
State of Oregon,
Respondent.

USAIR, INC.,
Appellant,

v.

DEPARTMENT OF REVENUE,
State of Oregon,
Respondent.

On appeal from the Oregon Tax Court
The Honorable Carl Byers, Judge

Argued and submitted October 6, 1988

Richard M. Botteri, Portland, argued the cause for appellants. On the brief and reply brief were Robert L. Weiss and James P. Draudt, respectively, and Richard

M. Botteri, and Weiss, DesCamp & Botteri, A Professional Corporation, Portland.

Elizabeth S. Stockdale, Assistant Attorney General, Salem, argued the cause for respondent. With her on the brief were Dave Frohnmayer, Attorney General, Virginia L. Linder, Solicitor General, and Jerry Bronner, Assistant Attorney General, Salem.

Before Peterson, Chief Justice, and Linde, Campbell,* Carson, Jones, Gillette, Justices, and Van Hoomissen, Justice, pro tempore.

CARSON, J.

The decision of the Oregon Tax Court is affirmed.

[Filed February 22, 1989]

* Campbell, Justice, retired December 31, 1988.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Case Name: *Alaska Airlines v. Department of Revenue*

Appellate case number: SC S34859 (Control) SC S34860

Trial Court or agency case number: OTC 2496/2497

Prevailing party or parties: Respondent

[ ] No costs awarded

[X] Costs awarded to the prevailing party or parties, payable by: Appellants

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FINAL ORDER*

IT IS ORDERED that on appeal or judicial review the prevailing party or parties recover from

costs and disbursements taxed at $————, and attorney fees in the amount of $————. (ORAP 11.03, 11.05, and 11.10).

IT IS FURTHER ORDERED that judgment be entered in favor of the Judicial Department and against

in the amount of $———— for filing fees not waived and unpaid at the time of entry of the final written disposition of this case. ORS 21.605.

Dated: SUPREME COURT

[SEAL]

* This section will be completed when the appellate judgment is prepared. The Records Division of the Office of the State Court Administrator will prepare the appellate judgment, enter it in the appellate register, and mail copies to the parties within the time and in the manner specified in ORAP 11.03. *See also* ORS 19.190(1).

CARSON, J.

Alaska Airlines, Inc. (Alaska), and Pacific Southwest Airlines, Inc. (PSA),[1] appeal a decision of the Oregon Tax Court upholding 1986 property tax assessments determined, in part, on the basis of time spent in the air by aircraft that flew over, but did not land in, Oregon.[2]

In 1986, Alaska and PSA were so-called "regional airlines" qualified to do business in Oregon. Each operated commercial airline service in western states, including Oregon, Washington and California. Alaska scheduled flights that landed in and departed from the Portland International Airport, whereas PSA operated aircraft that flew into and out of Portland, Eugene, Medford and Redmond. Forty-nine employees worked in Alaska's Oregon facilities, and 74 employees worked in PSA's Oregon facilities. For each airline these employees represented about 1 percent of its total work force. Each airline maintained its corporate headquarters, flight-training facility, major repair facility and base-maintenance facilities in states other than Oregon. Each was incorporated in a state other than Oregon.

Alaska and PSA also operated flights that originated from cities outside Oregon and that flew over Oregon, without landing, to destinations in other states, *e.g.*, non-stop from Seattle to Los Angeles. These flights, called "overflights," represented 45 to 49 percent of each airline's total flight time over Oregon. As might be expected, overflights involved little contact with ground facilities, and the State of Oregon did not provide regular service to overflights. Regular government service to overflights

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[1] As the result of a merger occurring on April 9, 1988, USAir, Inc. has been substituted as the real party in interest for Pacific Southwest Airlines, Inc. In the interests of consistency with the proceedings below, we refer to appellant as Pacific Southwest Airlines, Inc. (PSA).

[2] The appeals of Alaska Airlines, Inc. and Pacific Southwest Airlines, Inc. were consolidated by order of this court dated April 11, 1988.

only occurred through radio communication with and radar tracking by air traffic controllers of the Federal Aviation Administration.

For ad valorem property tax purposes, the Department of Revenue (Department) is required to assess certain designated utilities and companies, including airlines, and to apportion the assessment among qualifying Oregon counties. ORS 308.505 to 308.660. By statute, the Department is permitted to value the airlines' property, both within and without Oregon, as a unit. ORS 308.555. It then must apportion a "fair" amount of the unit value to Oregon. *Southern Pacific Trans. Co. v. Dept. of Rev.*, 302 Or 582, 585, 732 P2d 18 (1987).

Alaska's and PSA's properties consisted of non-mobile (ground) and mobile (aircraft) properties constituting the total system properties of the airlines. The Department allocated to Oregon portions of the values of the total system properties of the airlines to determine each airline's 1986 property tax assessment. According to the airlines, allocating these portions involved the following steps:

First, the Department allocated to Oregon a portion of the value of each airline's ground property. These amounted to $204,000 and $687,000 for Alaska and PSA, respectively. These allocations and the method by which they were determined are not at issue.

Second, the Department allocated to Oregon a portion of the value of each airline's aircraft property. To determine these portions, the Department used the following formula:

$$\text{Allocation Percent} = \frac{\text{OR Ground} + \text{OR Flight} + \text{OR Flyover}}{\text{Total System Hours}}$$

OR Ground	= Oregon ground time
OR Flight	= Oregon flight time for aircraft landing in and departing from Oregon
OR Flyover	= Flyover time for overflights
Total System Hours	= All system flight and ground time wherever generated

"OR Ground," as the name suggests, represented the amount of time that aircraft spent on the ground in Oregon and was calculated as a standard one-half hour for each flight. "OR Flight" and "OR Flyover" represented flight time for aircraft that flew within the borders of Oregon "equated" to the type of aircraft flown. "OR Ground" also was "equated." "Equating" involved, in effect, crediting to more valuable aircraft additional time over that actually spent in the air or on the ground.[3] The Department then derived the "Allocation Percent" for each airline's aircraft property by dividing the product of "OR Ground," "OR Flight" and "OR Flyover" by each airline's "Total System Hours," which simply represented all "equated" flight and ground time throughout each airline's system.

The Department next took the percentage that the value of each airline's aircraft property represented to the total system value of each airline. That figure was 81.8 percent for Alaska and 88.07 percent for PSA. It multiplied this percentage by the "Allocation Percent" derived through use of the formula above—5.3718 percent for Alaska and 3.5011 percent for PSA. The resulting product was multiplied by the total system value of each airline to allocate to Oregon a portion of the value of each airline's aircraft property—$21,091,000 for Alaska and $25,439,000 for PSA. These were added to the ground property allocations to determine the 1986 property tax assessments.

Alaska and PSA argue that the Department's method of allocating aircraft property resulted in invalid tax

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[3] The following example illustrates "equating." Among its various aircraft Alaska operated the B727-200 and the MD-83. The MD-83 was worth 2.47543 times what the B727-200 was worth and so was assigned an "equating factor" of 2.47543. The "equating factor" assigned to the B727-200 was 1.0000. An hour "equated" for an MD-83 thus became 2.47543 "equated" hours; an hour "equated" for a B727-200 remained one hour, but "equated."

assessments. They specifically object to the use of overflight time to determine a portion of the value of aircraft property. Phrased in terms of the above formula, they argue that the Department should not have included "OR Flyover" in the numerator. They argue that the Department's formula violated the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the United States Constitution and ORS 308.550(2).[4]

The Tax Court did not agree. *Alaska Airlines v. Dept. of Rev.*, 10 OTR 518 (1987). We discuss, in turn, each of the airlines' arguments and affirm for the reasons set forth below.[5]

I. DUE PROCESS

Alaska and PSA argue that the State of Oregon did not confer protection, opportunities or benefits on overflights. They argue that overflights did not generate revenue, use public facilities or cause commerce to be conducted in this state. They contend that "alleged benefits," including search and rescue services[6] and criminal law protection,[7] were "too nebulous and speculative to justify

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[4] Alaska and PSA also raise an argument based on Article I, section 32, of the Oregon Constitution (uniformity of taxation). They failed to raise this argument in the Tax Court, however. We decline to address the issue. *Leiser v. Sparkman*, 281 Or 119, 122, 573 P2d 1247 (1978).

To the extent that plaintiffs raise a separate statutory issue of situs under ORS 308.515 and 308.550(2), we likewise do not consider this assertion because it was not raised to the Tax Court.

[5] Because the airlines' statutory argument concerns a statute codifying constitutional standards, we first address those constitutional standards.

[6] *See* ORS chapter 401 and 491.190.

[7] *See* ORS 131.205 and 131.215(1). *See also* ORS 493.160 and 493.991(2) (prohibiting operation of aircraft recklessly or while under influence of drugs), which may afford some protection to commercial aircraft.

the taxation of overflights." In short, Alaska and PSA focus exclusively on overflights—they argue that overflights did not have a connection to or contact with this state sufficient to justify a tax under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[8]

This premise—that the Department assessed taxes against overflights—is the fly in the airlines' ointment. The Department did not assess overflights or specific aircraft; the Department assessed each airline's aircraft property based on a formula reflecting (in part) time spent in the air by that aircraft. The validity of each airline's tax assessment does not depend upon whether the state could have assessed a tax against overflights—the state did not do so. Rather, the validity depends upon whether each airline's aircraft property was part of a *unit* with situs in this state and whether the state fairly apportioned that unit.

Alaska's and PSA's aircraft properties constituted integrated enterprises whose business was to transport passengers and cargo between cities in western states. These enterprises conducted operations into and out of Oregon airports, with each enterprise having regular contact with this state through aircraft landings, departures, boarding and deplaning of passengers and loading and unloading of cargo. They enjoyed the benefits and protection of Oregon criminal laws, the provision of search and rescue services if needed and opportunities for further commerce through contacts with Oregon. Alaska's and PSA's aircraft properties functioned as units with sufficient contact with this state to sustain the power of the state to levy an apportioned ad valorem tax.

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[8] Amendment XIV, section 1, of the United States Constitution (the Due Process Clause) provides, in part:

> "No State shall * * * deprive any person of life, liberty, or property, without due process of law."

Braniff Airways v. Nebraska Board, 347 US 590, 600-02, 74 S Ct 757, 98 L Ed 967 (1954).

Although the units of the airlines' aircraft properties thus had situs in Oregon, the Due Process Clause also required that the Department fairly apportion the units. The state may not tax extraterritorial value. *Norfolk & W.R. Co. v. Tax Comm'n.,* 390 US 317, 324-25, 88 S Ct 995, 19 L Ed 2d 1201 (1968); *Southern Pacific Trans. Co. v. Dept. of Rev., supra,* 302 Or at 588-89. The question remains whether overflight time could be used to apportion Alaska's and PSA's aircraft properties.

Whether an overflight occurs "in" a state has not before been raised under the Due Process Clause. *But cf. State v. Northwest Airlines,* 213 Minn 395, 7 NW2d 691 (1942), *aff'd sub nom Northwest Airlines v. Minnesota,* 322 US 292, 64 S Ct 950, 88 L Ed 1283 (1944) and *Northwest Airlines v. State Tax Appeal Bd.,* 720 P2d 676 (Mont 1986). Nevertheless, the question is not difficult. A formula apportioning aircraft property on the basis of time spent in the air or on the ground is analogous to a formula apportioning railroad rolling stock on the basis of miles of track. *See Norfolk & W.R. Co. v. Tax Comm'n., supra.* Just as rolling stock moves from state to state, requiring reference to fixed, quantifiable factors such as miles of track for apportionment purposes, so too do aircraft used in interstate transportation require reference to quantifiable factors. Time is such a factor, and the airlines do not object to a formula apportioning on the basis of time when restricted to aircraft that landed at or departed from an Oregon airport.

But aircraft are, of course, different from rolling stock. Rolling stock and railroad track touch the ground, but aircraft in flight, obviously, do not. Overflight aircraft did not touch the ground in Oregon *at all*—and hence the airlines' argument that overflight time did not occur "in" this state for purposes of the 1986 tax assessments.

This argument, however facially appealing, does not persuade. It has, to paraphrase Justice Hugo L. Black on a different matter, a superficial plausibility that cloaks a lack of substance. *See United States v. Wallace Co.*, 336 US 793, 799, 69 S Ct 824, 93 L Ed 1042 (1949). Alaska and PSA concede that air time of aircraft landing at or departing from Oregon airports could have been included in the numerator of the Department's apportionment formula (so-called "ramp to ramp" time). They concede that such time could have been used to apportion aircraft property. But their premise—that overflights did not occur "in" this state—and their conclusion—that overflight time could not have been used to apportion aircraft—lead to an anomaly. The airlines do not explain how what was indistinguishable when it occurred—ramp to ramp time and overflight time were both, by definition, time spent in the skies above this state—became distinguishable because ramp to ramp aircraft landed at or departed from this state.

Alaska and PSA also do not explain where an overflight was if not "in" this state while traveling within the borders of this state. "In" would seem to be the answer because the airlines concede (as they must) the applicability of Oregon criminal law to overflights. Although Alaska and PSA argue that the value represented by an overflight should have been taxed to the domiciliary state, that argument does not address whether the overflight was "in" this state for purposes of apportioning aircraft property.

We conclude that the Department properly included overflight time in the numerator of the apportionment formula. Each airline's aircraft property, considered as a unit, had situs in this state. Moreover, inclusion of overflight time to apportion aircraft property did not tax extraterritorial value. For apportionment purposes, an overflight was "in" this state.

II. COMMERCE CLAUSE

The United States Supreme Court stated the test for the validity of a state tax under the Commerce Clause in *Complete Auto Transit, Inc. v. Brady*, 430 US 274, 97 S Ct 1076, 51 L Ed 2d 326 (1977).[9] A state tax does not offend the Commerce Clause when the tax is: (1) Applied to an activity with a "substantial nexus" with the taxing state; (2) fairly apportioned; (3) nondiscriminatory against interstate commerce; and (4) fairly related to services provided by the state. *Complete Auto Transit, Inc. v. Brady, supra*, 430 US at 279; *see also Budget Rent-A-Car v. Multnomah Co.*, 287 Or 93, 104-05, 597 P2d 1232 (1979). This test for determining whether a tax is valid under the Commerce Clause is similar to the test for determining whether a tax is valid under the Due Process Clause. *See Norfolk & W.R. Co. v. Tax Comm'n., supra*, 390 US at 323-25; *Southern Pacific Trans. Co. v. Dept. of Rev., supra*, 302 Or at 588. Alaska and PSA argue that the 1986 taxes were not applied to activities with a substantial nexus with this state, fairly apportioned or fairly related to services provided by this state.

Substantial Nexus

For a substantial nexus to exist, there must be "some definite link, some minimum connection," between the taxing state and the taxed activity.[10] *Nat. Bellas Hess*

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[9] Article I, section 8, clause 3, of the United States Constitution provides, in part, that "Congress shall have Power * * * [to] regulate Commerce * * * among the several States."

[10] The overlap between the Due Process and Commerce Clauses is most manifest in the "substantial nexus" requirement of the latter. Professor Tribe writes:

> "* * * The degree of 'connection,' 'contact,' or 'nexus' between the taxing state and the interstate commerce taxed is also the fundamental measure of whether or not a state tax vio-

v. Dept. of Revenue, 386 US 753, 756, 87 S Ct 1389, 18 L Ed 2d 505 (1967) (quoting *Miller Bros. Co. v. Maryland*, 347 US 340, 344-45, 74 S Ct 535, 98 L Ed 744 (1954)). As they did in arguing under the Due Process Clause, the airlines try to shift the focus to the view that the state taxed overflights rather than the units of which overflights were parts.

In *Adams Express Company v. Ohio*, 165 US 194, 17 S Ct 305, 41 L Ed 683 (1987), the U.S. Supreme Court recognized that under the Commerce Clause a state may value as a unit an integrated business enterprise operating in interstate commerce. In *Adams Express*, the property was personal and not physically connected, yet it was used in concert to carry on the interstate commerce of the express company. The Court looked to a "unity of use, not simply for the convenience or pecuniary profit of the owner, but existing in the very necessities of the case—resulting from the very nature of the business." *Adams Express Company v. Ohio*, *supra*, 165 US at 222.

Alaska's and PSA's aircraft properties functioned as did the property of the express company in *Adams Express*. Each airline's aircraft property comprised part of a "unity of use"—the business of transporting passengers and cargo—and so was used in an integrated and coordinated manner to carry on interstate commerce. The consequence must be as it was in *Adams Express*—the activities of the airlines' units of aircraft properties established the substantial nexuses required under the Commerce Clause.

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lates the commerce and due process clauses. * * * [T]o the extent that a state can point to a substantial connection with a particular aspect of interstate commerce, it can also demonstrate that its program is consistent with the commerce and due process clauses." L.H. Tribe, *American Constitutional Law* 446 (2d ed 1988).

Fair Apportionment

The Commerce Clause requires that an apportionment formula bear a rational relationship, both on its face and as applied, to property values connected with the taxing state. *Norfolk & W.R. Co. v. Tax Comm'n, supra,* 390 US at 325. A state may not tax an activity carried on outside its borders. *See Complete Auto Transit, Inc. v. Brady, supra,* 430 US at 282 (quoting *Memphis Gas Co. v. Stone,* 335 US 80, 96-97, 68 S Ct 1475, 92 L Ed 1832 (1948) (Rutledge, J., concurring)); *Southern Pacific Trans. Co. v. Dept. of Rev., supra,* 302 Or at 589 (state may not tax extraterritorial value). The airlines again characterize the taxes as, in part, taxes assessed against overflights—and they again mischaracterize the taxes.

The Department assessed portions of the values of the airlines' aircraft properties. Aircraft were on the ground or in the air at any given time; the Department's formula reflected this fact. More precisely, the formula reflected that portion of time that each airline's aircraft property spent on the ground or in the air *in Oregon.* This was a fair manner of determining the extent of each airline's aircraft activity in Oregon, and it was a fair manner of apportioning property based on the presence of each airline's aircraft.

Alaska and PSA argue, however, that the formula resulted in values wildly at odds with values that might have been achieved by formulas used to apportion in seven other western states. These formulas did not include overflight time in their numerators. The airlines draw the conclusion that these formulas showed "a uniform practice contrary to Oregon's," thus rendering the Department's formula suspect under the Commerce Clause.

Although there is merit in the airlines' argument, *see Southern Pacific Trans. Co. v. Dept. of Rev., supra,* 302 Or at 589 (commerce clause may require apportionment formula not substantially different from formulas used

by other states), the airlines tell an incomplete story. The ultimate test is whether the taxing state itself apportions fairly. *Id.* The seven other western states might have failed to apportion to themselves full values consistent with the Commerce Clause. Because the Department's formula resulted in fair apportionment of the values of the airlines' aircraft properties, the use of different formulas by other states was not in itself reason for this state to have changed its apportionment practice.

Phrased in terms of the "internal and external consistency tests" of the U.S. Supreme Court, *see, e.g., Goldberg v. Sweet*, 1989 US LEXIS 308, the formula used by the Department complied with the fair apportionment requirement of the Commerce Clause. The formula was internally consistent because, were every state to have used it, no multiple taxation would have resulted—only 100 percent of aircraft value would have been taxed. Moreover, it was externally consistent because it reflected only in-Oregon aircraft activity.

Fair Relation to Services Provided

The inquiry into whether a tax bears a fair relationship to services provided by the taxing state is similar to the inquiry into whether the tax was assessed against an activity with a substantial nexus with the state. *Commonwealth Edison Co. v. Montana*, 453 US 609, 625-26, 101 S Ct 2946, 69 L Ed 2d 884 (1981); *see also Budget Rent-A-Car v. Multnomah Co., supra*, 287 Or at 105 n 6. This fourth prong of the *Complete Auto Transit* test, however, imposes the additional limitation that "the *measure* of the tax must be reasonably related to the extent of the contact [with the taxing state], since it is the activities or presence of the taxpayer in the State that may properly be made to bear a 'just share of state tax burden.'" *Commonwealth Edison Co. v. Montana, supra*, 453 US at 626. (Emphasis in original.) (Citations omitted.) The tax must be assessed in proportion to benefits, opportunities and protection conferred or

afforded by the taxing state, but it need not be assessed only as *compensation* for services provided. *Id.* at 622-24. The Commerce Clause does not demand that a state tax only on the basis of *quid pro quo. See Budget Rent-A-Car v. Multnomah Co., supra,* 287 Or at 105 n 6.

The Department assessed Alaska and PSA based on the presence, as reflected in air and ground time, of aircraft property in this state. The taxes were proportioned to the extent of the activities of the airlines' units of aircraft properties within this state. While engaging in these activities, the airlines enjoyed benefits, opportunities and protection conferred or afforded by this state—search and rescue services, opportunities for further commerce and the protection of Oregon criminal laws—and so could be made to bear a "just share of state tax burden." The taxes were fairly related to services provided by this state.

We conclude that the Department's inclusion of overflight time in the numerator of its apportionment formula did not violate the Commerce Clause.

III. STATUTORY ISSUE

ORS 308.550(2)[11] requires the Department to use a "reasonable method" when it uses an apportionment method other than that prescribed by ORS 308.550(1). Alaska and PSA argue that the Department did not use a reasonable method.

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[11] ORS 308.550(2) provides:

> "If the value of any property having a situs in this state, of a company operating both within and without the state, cannot fairly be determined in the manner prescribed in subsection (1) of this section, the department may use any other reasonable method to determine the proper proportion of the entire property assessable for taxation in this state."

ORS 308.550(2) has not been changed since its enactment in Oregon Laws 1955, chapter 735, section 2.

The "reasonable method" requirement of ORS 308.550(2) codifies Due Process and Commerce Clause standards. *Southern Pacific Trans. Co. v. Dept. of Rev., supra,* 302 Or at 588. An apportionment formula that complies with these standards complies with the requirement that the Department use a reasonable method in apportioning property. Because the Department's formula complied with the federal constitutional standards, it complied with ORS 308.550(2).

The decision of the Tax Court is affirmed.

APPENDIX B

IN THE OREGON TAX COURT

Property Tax

No. 2496

ALASKA AIRLINES, INC.,
Plaintiff,

v.

DEPARTMENT OF REVENUE,
State of Oregon,
Defendant.

No. 2497

PACIFIC SOUTHWEST AIRLINES, INC.,
Plaintiff,

v.

DEPARTMENT OF REVENUE,
State of Oregon,
Defendant.

OPINION

Plaintiffs, incorporated and headquartered in other states, are airlines qualified to do business in Oregon. In conducting their businesses, plaintiffs utilize both mobile (primarily airplanes) and nonmobile transportation property. Plaintiffs do not question the taxation of their nonmobile property located in Oregon. This appeal pertains only to property taxes attributable to plaintiffs' mobile property. Although not formally consolidated, the

parties agreed for the sake of convenience and efficiency that these cases be tried, briefed and decided together.

By statute, defendant is required to assess plaintiffs' property for ad valorem taxation.

> "(1) The Department of Revenue shall make an annual assessment * * * of the following property having a situs in this state:
>
> "(a) * * * any property used or held for its own future use by any company in performing or maintaining any of the following businesses or services * * * : * * * air transportation using aircraft * * * for scheduled air service; * * *." (ORS 308.515)

Because plaintiffs operate both within and without Oregon, defendant valued plaintiffs' property under ORS 308.550(2) using a formula which apportions a part of plaintiffs' property to Oregon. ORS 308.550(2) provides:

> (2) "If the value of any property having a situs in this state, of a company operating both within and without the state, cannot fairly be determined in the manner prescribed in subsection (1) of this section, the department may use any other reasonable method to determine the proper proportion of the entire property assessable for taxation in this state."

The method defendant chose in this case was to apply a single-factor formula (time) composed of three elements: Ground time, flight time (for aircraft landing and departing Oregon) and fly-over time (for aircraft which fly over Oregon but do not touch down).

Plaintiffs do not dispute that their operations in Oregon are taxable, nor do they dispute use of the time-factor formula based on the ground time and flight time elements. What plaintiffs do dispute is the inclusion of fly-over time in the numerator of the formula. Plaintiffs' claim that inclusion of fly-over time in the numerator is contrary to the "reasonable" requirement of the statute

and violates the Due Process Clause and the Commerce Clause of the United States Constitution.[1]

The cases which chronicle the history of taxation of businesses operating interstate are numerous and not always consistent. Although the United States Supreme Court has applied the Due Process Clause and the Commerce Clause with overlapping requirements in some cases, they are not the same. Privilege and income taxes need to satisfy the "nexus" test of the Due Process Clause but property taxes can only be imposed on property which has "situs" in the taxing state. Further, in the area of property taxation, it is necessary to distinguish cases where the issue is the amount of property taxable as opposed to the value of the property taxable. *Adams Express Co. v. Ohio State Auditor*, 165 US 194, 17 S Ct 305, 41 L Ed 683 (1897).

Consequently, it is necessary to relate the language of the cases to the underlying tax concepts.[2] For example, plaintiff cites *Wisconsin v. J. C. Penney Co.*, 311 US 435, 444, 61 S Ct 246, 85 L Ed 267 (1940), for the proposition that the tax must bear "fiscal relation to protection, opportunities and benefits given by the state." Plaintiff argues that: "It is clear that it is the degree of presence for commercial purposes and the substance of the contacts which give rise to taxability." (Plaintiff's Post Trial Memorandum, at 14). While plaintiffs' argument and its quotation of the court are appropriate to that case, which was a privilege tax case, such may be

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[1] The statutory standard of "any other reasonable method" is implicitly controlled by the constitutional standards. The court is unable to visualize a method which would meet the constitutional requirements but would be otherwise considered unreasonable.

[2] As Justice Douglas pointed out in his concurring opinion in *Braniff Airways v. Nebraska State Board*, 347 US 590, 74 S Ct 757, 98 L Ed 967 (1953):

> "What might be an adequate formula for a gross receipts tax might be inadequate for an ad valorem tax."

somewhat misleading as to a property tax case. If property is located in a state, it is subject to taxation regardless of whether it is used for commercial purposes or used at all. Jurisdiction to tax property is not a function of its use but of its location.

Defendant's citation of *Communication Satellite Corp. v. Franchise Tax Board*, 156 Cal App 3d 726, 203 Cal Rptr 779 (1984), which was an income tax case, is likewise of little benefit in this case. Looking to an income tax case for guidance, either in terminology or tests, may be misleading for a property tax case.

Commerce Clause

The fundamental basis for taxing plaintiffs' property was explained by Justice Douglas in his concurring opinion in *Braniff Airways v. Nebraska State Board*, 347 US 590, 74 S Ct 757, 98 L Ed 967 (1953), where he stated:

> "My understanding of our decisions is that the power to lay an ad valorem tax turns on the permanency of the property in the State. All the property may be there or only a fraction of it. Property in transit, whether a plane discharging passengers or an automobile refueling, is not subject to an ad valorem tax. *Property in transit may move so regularly and so continuously that part of it is always in the State. Then the fraction, but no more, may be taxed ad valorem.*" (Emphasis supplied.)

Or, as stated in *Johnson Oil Refinery Co. v. Oklahoma*, 290 US 158, 162, 54 S Ct 152, 78 L Ed 238 (1933):

> "The basis of the jurisdiction is the habitual employment of the property within the State."

For the ad valorem tax, the test under the Commerce Clause is simple. As stated by the United States Supreme Court in *Ott v. Mississippi Valley Barge Line Co.*, 336 US 169, 173, 69 S Ct 931, 93 L Ed 585, 589 (1948):

> "The problem under the Commerce Clause is to determine 'what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions.' [Citing *Nashville, C and St. L. R. Co. v. Browning*, 310 US 362, 365, 84 L Ed 1254, 1255, 60 S Ct. 968.]"

Or, as stated in the negative:

> "A State will not be permitted, under the shelter of an imprecise allocation formula or by ignoring the peculiarities of a given enterprise to 'project the taxing power of the state plainly beyond its borders.'" *Norfolk and Western R. Co. v. Missouri Tax Com.*, 390 US 317, 88 S Ct 995, 19 L Ed 1201 (1968).

Thus the test under the Commerce Clause is whether the formula employed by the defendant fixes a reasonable fraction of plaintiffs' mobile property as being situated in the State of Oregon by virtue of its habitual employment in the state.

In *Ott v. Mississippi Valley Barge Line Co., supra*, Louisiana and the City of New Orleans levied ad valorem taxes on the plaintiff's barges which transported freight interstate via the Mississippi and Ohio Rivers. The formula for apportioning the ad valorem tax was the ratio between the number of miles in Louisiana and the total number of miles in the system. In upholding the tax, the court found no difference between water vessels and railroad cars as far as applying the Due Process Clause or the Commerce Clause. Later, the court in *Braniff Airways v. Nebraska State Board*, 347 US 590, 74 S Ct 757, 98 L Ed 967 (1953), found that:

> "A closer analogy exists between planes flying interstate and boats that ply the inland waters. We perceive no logical basis for distinguishing the constitutional power to impose a tax on such aircraft from the power to impose taxes on river boats." (At 600.)

This court likewise finds no logical distinction between boats which ply Oregon's navigable inland waters, over which the federal government has jurisdiction, and airplanes which fly the skies of Oregon, over which the federal government has jurisdiction. In both cases, the state's power to tax is not displaced by the federal government's power to regulate. Regulation does not remove the property from the presence of the state.[3] The court finds that the inclusion of the fly-over time in the formula is reasonable. Application of the formula does not allocate to Oregon property which is outside its borders. The purpose of the formula is to measure that portion of plaintiffs' property which is habitually employed within the state. If the formula is accurate, "freezing" plaintiffs' operations at an average instant on a typical day would find approximately the same proportion of property in Oregon as indicated by the formula.

Plaintiffs argue that use of the fly-over element in the numerator is not appropriate because plaintiffs' airplanes which merely fly over have no contact with and receive no benefits from the state. If this were true, then the fly-over factor should not be included in either the denominator or the numerator. If it is not relevant to determine the presence of property for tax purposes, its relevance is not affected by the fact that plaintiff may wish to use it in the denominator.

The court acknowledges the point made by Justice Frankfurter in his dissent in *Braniff* that while one state's formula may be reasonable, the uncoordinated cumulative effect of different reasonable formulas of many states may impose an undue burden on interstate com-

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[3] In so deciding, the court is assuming that plaintiffs' airplanes fly low enough to be in Oregon airspace as opposed to being in outerspace. As technology changes, undoubtedly an issue which must be decided in the future is where air ends and space begins. *See*, for example, Arnold Duncan McNair, *The Law of the Air*, (3d ed 1964).

merce. Plaintiff argues strenuously that defendant's position erroneously assumes all states use the same formula and fails to recognize that the state of domicile may tax all unapportioned property. This court is in no better position than was the Supreme Court in *Braniff* to determine whether in fact there is any danger of plaintiffs being subject to double taxation. It is clear, however, that the domiciliary state cannot tax the full value of property located only part of the time in that state. *Standard Oil Co. v. Peck*, 342 US 382, 72 S Ct 309, 96 L Ed 427 (1952). If plaintiffs' airplanes are habitually employed in other states, which would appear to be the case for regularly scheduled airlines, plaintiffs should be able to avoid the undue burden they fear.

Due Process

The Fourteenth Amendment of the United States Constitution prohibits depriving a person of property without due process. As applied to taxation, the law assumes that the quid pro quo for the tax taken by government are the benefits received. The tax burden, when compared with the benefits, may fall unequally upon taxpayers.

> "This is almost unavoidable under every system of direct taxation. But the tax is not rendered illegal by such discrimination. Thus every citizen is bound to pay his proportion of a school tax, though he have no children; of a police tax, though he have no buildings or personal property to be guarded; or of a road tax, though he never use the road." *Union Refrigerator Transit Co. v. Kentucky*, 199 US 194, 203, 26 S Ct 36, 50 L Ed 199 (1905).

> "Moreover, there is no requirement under the Due Process Clause that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services pro-

vided to the activity. Instead, our consistent rule has been:

> "Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.
>
> "A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes.'" *Commonwealth Edison Co. v. Montana*, 453 US 609, 622, 101 S Ct 2946, 69 L Ed 2d 884 (1981).

Thus the basic test of the Due Process Clause may be phrased as follows:

> "The simple but controlling question is whether the state has given anything for which it can ask return." *Wisconsin v. J. C. Penney Co.*, 311 US 435, 444, 61 S Ct 246, 85 L Ed 267 (1940).

There can be no question that Oregon affords plaintiffs substantial benefits as to its airplanes which land and depart from Oregon. The question is whether plaintiffs' fly-overs receive any benefit that would justify the inclusion of that element in the apportionment formula.[4] The court believes the answer to this question is affirmative. Oregon's criminal laws and its enforcement of those laws extends into the skies as well as upon the waterways and the land. Defendant points out that Oregon provides funds for search and rescue at no cost to the airlines if

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[4] Although defendant disclaims that the tax is being imposed on the fly-over planes, that is precisely the effect of including them in the formula.

a plane were to go down. Theoretically, however, it is not necessary to find specific benefits for the fly-over planes only. The benefits received by plaintiffs' operations which touch down in Oregon are sufficiently great to extend to all of plaintiffs' property in Oregon under the "benefits of civilization" test.

The court finds that inclusion of the fly-over time element in the apportionment formula is a "reasonable method" to apportion plaintiffs' property for taxation in Oregon. The court further finds that the formula meets the requirements of the Commerce Clause by determining an appropriate fraction of plaintiffs' property that is habitually employed within the state and also meets the requirements of the Due Process Clause by providing broad scope benefits directly and indirectly to plaintiffs and their properties. Judgment will be entered in each case consistent with this opinion. Costs to neither party.

Dated this 14th day of December, 1987.

/s/ Carl H. Byers
Judge

APPENDIX C

STATE OF OREGON
DEPARTMENT OF REVENUE

No. A&AU-86-24

IN THE MATTER OF THE PETITION OF

ALASKA AIRLINES, INC.

for Review of its True Cash Value
Assessment for the Year 1986.

OPINION AND ORDER

Alaska Airlines, Inc. appealed to the Department of Revenue for a reduction of the property tax assessment as of January 1, 1986 on its properties assessable by the Department.

I held a hearing at the Department of Revenue office in Salem, Oregon on June 27, 1986. Korbey Hunt, Properties Manager, represented the company. The Department staff was represented by Rudy Bischof and Ed Gerhardus.

The petition requested the system value be lowered from $480,000,000 to $310,000,000. Mr. Hunt explained that this was a figure based on estimates made for budget purposes and was not based on an appraisal. Mr. Hunt also raised questions on the handling of aircraft leased to others and the rounding upward of the leased aircraft cost indicators.

The main issue was the inclusion of fly-over time in the allocation factor. Mr. Hunt stated that the use of fly-

over time is unfair to Alaska Airlines because they receive no benefits from this taxation. He presented several documents relating to laws and legal decisions. He also submitted an allocation calculation which excluded fly-over time.

I have reviewed this information and have concluded that the present allocation method is reasonable. I also approve the system value at $480,000,000.

NOW, THEREFORE, in the matter of the appeal of Alaska Airlines, Inc. for a reduction in true cash value as of January 1, 1986, on its properties assessable by the Department of Revenue, it is

ORDERED that the true cash value of said property as of January 1, 1986, of $21,295,000 is sustained.

Done at Salem, Oregon, this 8th day of July, 1986.

DEPARTMENT OF REVENUE

/s/ Robert Getz

NOTICE: If you are dissatisfied with this decision, you may appeal it to the Oregon Tax Court, 520 Justice Building, Salem, Oregon 97310, within 60 days of the date of mailing shown above. ORS 305.560.

STATE OF OREGON
DEPARTMENT OF REVENUE

No. A&AU-86-25

IN THE MATTER OF THE PETITION OF

PACIFIC SOUTHWEST AIRLINES

for Review of its True Cash Value
Assessment for the Year 1986.

OPINION AND ORDER

Pacific Southwest Airlines appealed to the Department of Revenue for a reduction of the property tax assessment as of January 1, 1986, on its properties assessable by the Department.

I held a hearing at the Department of Revenue office in Salem, Oregon on June 26, 1986. The company was represented by Jeffrey Peterson and Denise Smith. The Department staff was represented by Rudy Bischof and Ed Gerhardus.

The staff recommended reducing the Oregon true cash value due to computation errors. I agree with that recommendation.

Mr. Peterson raised the issue of the inclusion of fly-over time in the Oregon allocation factor. He contended that using fly-over time is unfair to PSA because it represents paying taxes for benefits which are not received. In addition, it is discriminatory in that some airlines which never land in Oregon do not pay taxes when their planes fly over the state. Mr. Peterson submitted several

alternative calculations for determining an allocation factor. I have reviewed this information and have concluded that the present allocation method is reasonable.

NOW, THEREFORE, in the matter of the appeal of Pacific Southwest Airlines for a reduction by the Department of Revenue, it is

ORDERED that the true cash value of said property as of January 1, 1986, is reduced from $26,797,000 to $26,126,000.

Done at Salem Oregon, this 8th day of July, 1986.

DEPARTMENT OF REVENUE

/s/ Robert Getz

NOTICE: If you are dissatisfied with this decision, you may appeal it to the Oregon Tax Court, 520 Justice Building, Salem, Oregon 97310, within 60 days of the date of mailing shown above. ORS 305.560.

APPENDIX D

IN THE SUPREME COURT
OF THE STATE OF OREGON

ALASKA AIRLINES, INC.,
Appellant,
v.

DEPARTMENT OF REVENUE, STATE OF OREGON,
Respondent.

USAIR, INC.,
Appellant,
v.

DEPARTMENT OF REVENUE, STATE OF OREGON,
Respondent.

(OTC 2496/2497; SC S34859 (Control)/SC S34860)

On Appeal from the Oregon Tax Court

The Honorable Carl Byers, Judge

Argued and submitted October 6, 1988

APPELLATE JUDGMENT

Richard M. Botteri, Portland, argued the cause for appellants. On the brief and reply brief were Robert L. Weiss and James P. Draudt, respectively, and Richard M. Botteri, and Weiss, DesCamp & Botteri, A Professional Corporation, Portland.

Elizabeth S. Stockdale, Assistant Attorney General, Salem, argued the cause for respondent. With her on the brief were Dave Frohnmayer, Attorney General, Virginia L. Linder, Solicitor General, and Jerry Bronner, Assistant Attorney General, Salem.

Before Peterson, Chief Justice, and Linde, Campbell,* Carson, Jones, Gillette, Justices, and Van Hoomissen, Justice, pro tempore.

CARSON, J.

The decision of the Oregon Tax Court is affirmed.

[Filed February 22, 1989]

DESIGNATION OF PREVAILING PARTY
AND AWARD OF COSTS

Case Name: *Alaska Airlines v. Department of Revenue*

Appellate case number: SC S34859 (Control) SC S34860

Trial Court or agency case number: OTC 2496/2497

Prevailing party or parties: Respondent

[ ] No costs awarded

[X] Costs awarded to the prevailing party or parties, payable by: Appellants

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* Campbell, Justice, retired December 31, 1988.

FINAL ORDER *

IT IS ORDERED that on appeal or judicial review the prevailing party or parties recover from Appellants costs and disbursements taxed at $145, and attorney fees in the amount of $——. (ORAP 11.03, 11.05, and 11.103).

Dated: May 1, 1989

SUPREME COURT
[SEAL]

* This section will be completed when the appellate judgment is prepared. The Records Division of the Office of the State Court Administrator will prepare the appellate judgment, enter it in the appellate register, and mail copies to the parties within the time and in the manner specified in ORAP 11.03. *See also* ORS 19.190(1).

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-21

ALASKA AIRLINE, INC. and USAIR, INC.,
Petitioner

v.

DEPARTMENT OF REVENUE OF OREGON

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including August 29, 1989.

/s/ Sandra Day O'Connor
SANDRA DAY O'CONNOR
Associate Justice of the
Supreme Court of the
United States

Dated this 25th day of July, 1989.